

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**A-B MERCHANTS LIMITED DBA
BEREKUM AFRICAN MARKET,**

Respondent.

**Docket No. FMCSA-2007-29050¹
(Midwestern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On June 7, 2007, the Federal Motor Carrier Safety Administration (FMCSA) Ohio Division Administrator served a Notice of Claim (NOC) on A-B Merchants Limited dba Berekum African Market (Respondent). The NOC, based on a March 31, 2007, compliance review, charged Respondent with two violations of the Federal Motor Carrier Safety Regulations: (1) one violation of 49 CFR 382.115(a), failing to implement an alcohol and/or controlled substances testing program; and (2) one violation of 49 CFR 391.51(a), failing to maintain a driver qualification file on each driver employed. The NOC proposed a civil penalty of \$2,200 for the violations.²

After Respondent failed to respond to the NOC, the Field Administrator for FMCSA's Midwestern Service Center (Claimant) served a Notice of Default and Final

¹ The prior case number was OH-2007-0150-US0702.

² Exhibit A to Claimant's Answer to Petition for Reconsideration and Motion to Deny (Claimant's Answer).

Agency Order (NDFAO) on July 16, 2007.³ The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective July 24, 2007, with the civil penalty immediately due and payable on that date.

On August 10, 2007, Respondent served a Petition for Reconsideration in which it essentially admitted the violations and sought reduction of the civil penalty on the grounds that the company changed ownership six months before the “time of the incident” and that it had taken unspecified necessary corrective action.⁴

In his Answer to the Petition for Reconsideration and Motion to Deny served August 21, 2007, Claimant requested that the petition be denied because: (1) it was not served within 20 days of the Final Agency Order, as required by the Agency’s Rules of Practice; and (2) Respondent did not provide sufficient cause for vacating the Final Agency Order.

2. Decision

Respondent defaulted because it did not file a response within 30 days of service of the NOC, as required by 49 CFR 386.14(a). Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

The Petition for Reconsideration was timely served. Although Claimant correctly notes that § 386.64(a) provides that a person may petition the Assistant Administrator for

³ Exhibit B to Claimant’s Answer.

⁴ Exhibit C to Claimant’s Answer. Although the Petition is dated August 1, 2007, it was mailed on August 10, 2007. See Exhibit D to Claimant’s Answer.

reconsideration within 20 days following service of the Final Agency Order, Claimant calculated the due date without taking into consideration § 386.8(c)(3), which adds 5 days to the prescribed response period when a party must respond to a document served upon it by mail. The NDFAO was served on July 16, 2007, by certified mail. Consequently, Respondent was required to serve a Petition for Reconsideration within 25 days of that date, which equates to August 10, 2007, not August 6, 2007, as argued by Claimant.⁵

Although the petition was timely served, Respondent failed to meet its burden of demonstrating that the Final Agency Order should be vacated. The petition does not address the question of why Respondent failed to reply to the NOC despite having ample opportunity to do so. Consequently, there is no basis for concluding its neglect was excusable. Moreover, Respondent did not present a meritorious defense to the violations alleged in the NOC, claiming only that there were mitigating factors warranting a reduction in the civil penalty.

Prior to revision of the Agency's rules of practice, effective November 14, 2005, the Agency held that if the motor carrier fails to reply to a Notice of Claim in a timely fashion and thereby defaults, it may not petition separately for reconsideration of the civil penalty amount.⁶ Although the revised rules provide the Assistant Administrator with the discretion to vacate defaults under the excusable neglect, meritorious defense and due diligence standards set forth in § 386.64(b), they were not intended to change the pre-

⁵ Under § 386.8(c)(1), service of all documents is deemed effected at the time of mailing.

⁶ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions For Reconsideration (March 15, 2002), at 3.

existing prohibition against petitioning separately for reconsideration of the civil penalty amount in the event of a carrier default. In discussing § 386.64(b) in the preamble to the revised rules of practice, the Agency indicated that it wanted to limit the grounds for vacating defaults to “relieve the parties, as well as the decisionmaker, of the burden of addressing other issues in these petitions for reconsideration.”⁷

We construe the term “meritorious defense” in § 386.64(b) as not applying to requests to reduce a proposed civil penalty where the respondent does not contest the substantive violations. In such cases, the respondent is admitting that it committed the violations and has no meritorious defenses. Requesting a waiver or reduction in the proposed civil penalty under these circumstances raises precisely the type of issue the rules were intended to exclude from consideration in a petition for reconsideration challenging a Final Agency Order pursuant to § 386.64(b). To the extent this conclusion is inconsistent with the discussion of challenges to civil penalties in *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration (October 8, 2008), that aspect of the *Wells & Wells* decision is overruled.⁸

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Even if, for the sake of argument, Respondent acted with due diligence by filing its Petition for Reconsideration less than three weeks after receiving the NDFAO, it would

⁷ 70 FR 28477 (May 18, 2005).

⁸ In *Wells & Wells*, the respondent did not submit a meritorious defense to the charges in the NOC, but alleged that payment of the proposed civil penalty would put it out of business. It was concluded that this allegation satisfied the meritorious defense prong with regard to the payment of the civil penalty.

be an empty exercise or futile gesture to vacate the Final Agency Order in the absence of a meritorious defense.⁹

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.¹⁰

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5-5-07
Date

⁹ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration (October 8, 2008), at 5.

¹⁰ The July 16, 2007, NDFAO stated that the \$2,200 civil penalty was due and payable on July 24, 2007, the date that the NOC would become the Final Agency Order. Because Respondent did not petition for reconsideration until after July 24, 2007, the clock on the effective date of the Final Agency Order was not stayed by the petition. Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 6 day of May, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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